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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**

15 UNITED STATES OF AMERICA, Ex.
16 Rel., RANDY CARVER,

17 Plaintiff,

18 vs.

19 FACTOR NUTRITION LABS, LLC.;
20 VITAL BASICS, INC.; WALGREEN CO.
21 and DOES 1-10, Inclusive,

22 Defendants.

23 Case No. CV-10-02529 EDL

24 **FIRST AMENDED COMPLAINT FOR**
FALSE PATENT MARKING

25 **JURY TRIAL DEMANDED**

26 **I. INTRODUCTION**

27 1. This lawsuit is brought to stop sophisticated Defendants from luring
28 vulnerable, elderly consumers into paying an outrageous price for a worthless dietary
supplement – namely, FOCUSfactor® Memory Booster (“FOCUSfactor®”) – by
falsely claiming that the product is patented (it is not). Based upon defendants’ affiliate

marketers' claims that FOCUSfactor® is patented, Defendants have sold over 4,000,000 bottles of FOCUSfactor® and generated over \$100,000,000 in revenues.

2. The false claims regarding FOCUSfactor®'s patent rights have misled consumers into paying an outrageous price for FOCUSfactor®, have stifled innovation by discouraging research and development of competing products, and have injured the general public by distorting the marketplace.

II. JURISDICTION, VENUE, AND STANDING

3. This Court has subject matter jurisdiction pursuant to 35 U.S.C. §292(b) and 28 U.S.C. § 1338(a).

4. Defendants are subject to personal jurisdiction in this District because they conduct business in this district and the exercise of jurisdiction over them would not offend traditional notions of fair play and substantial justice.

5. Venue is proper in this District under 28 U.S.C. §§1391(c) and 1395(a), because Defendants' products that are the subject of this Complaint are advertised for sale, offered for sale, and sold within this judicial district.

6. Plaintiff possesses the requisite standing required by Article III of the United States Constitution pursuant to 35 U.S.C. §292(b), which confers upon any person the right to sue for civil monetary penalties, restitution, and injunctive relief for false patent marking.

III. THE PARTIES

A. The Plaintiff

7. Plaintiff, RANDY CARVER, is a California citizen who believes in the importance of a fair and competitive market for the manufacture, marketing, sale, and distribution of consumer products. He also purchased FOCUSfactor® at Walgreens in early 2010.

111

1 **B. The Defendants**

2 8. Defendant VITAL BASICS, INC. is a corporation doing business
 3 throughout the United States that owns, advertises, and distributes the FOCUSfactor®
 4 brand of memory supplements.

5 9. Defendant FACTOR NUTRITION LABS, LLC is a limited liability
 6 company located in Portland, Maine and doing business throughout the United States
 7 that owns, advertises and distributes the FOCUSfactor® brand of memory supplements.

8 10. Defendant WALGREEN CO. is a corporation doing business throughout
 9 the United States that independently advertises and sells the FOCUSfactor® brand of
 10 memory supplements.

11 11. Plaintiffs do not know the true names or capacities of the persons or
 12 entities sued herein as DOES 1 to 10, inclusive, and therefore sue such Defendants by
 13 such fictitious names. Plaintiffs will amend this complaint to set forth the true names
 14 and capacities of these Defendants when they have been ascertained.

15 **IV. BACKGROUND FACTS**16 **A. The Purpose of this Action**

17 12. The purpose of this lawsuit is to act in the public interest to enforce the
 18 policy underlying the false marking statute, 35 U.S.C. §292.

20 **B. The Policy of the Patent Marking Statute**

21 13. The patent marking statute (35 U.S.C. §287 and the false patent marking
 22 statute (35 U.S.C. §292) exist to ensure that the public has accurate information
 23 regarding the existence, scope, and nature of patent rights.

24 14. The purposes of the patent marking statute were explained by the Federal
 25 Circuit in *Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1443 (Fed. Cir. 1998), as:
 26 (1) helping to avoid innocent infringement, (2) encouraging patentees to give notice to

1 the public that the article is patented, and (3) aiding the public to identify whether an
 2 article is patented.

3 15. Over half a century ago, the Supreme Court stated in *Precision Instrument*
 4 *Mfg. Co. v. Automotive Maintenance Machinery*, 324 U.S. 806, 816 (1945), that patents
 5 by their very nature are affected with a public interest:

6 *The possession and assertion of patent rights are 'issues of great moment to the*
 7 *public.' A patent by its very nature is affected with a public interest. As*
 8 *recognized by the Constitution, it is a special privilege designed to serve the*
 9 *public purpose of promoting the 'Progress of Science and useful Arts.' At the*
 10 *same time, a patent is an exception to the general rule against monopolies and to*
 11 *the right to access to a free and open market.*

12
 13 16. The Patent Act of 1952 provides a *qui tam* cause of action on behalf of the
 14 public to fine the offender in an amount of up to \$500 for each falsely marked article,
 15 with half of any recovery paid to the United States government and half of any recovery
 16 paid to the plaintiff bringing the action.

17 17. False marking of unpatented articles as “patented” is injurious to the public
 18 Interest in at least the following ways:

- 19 • Acts of false marking deter innovation and stifle competition in the
 20 marketplace.
- 21 • False marks deter scientific research when an inventor sees a mark and
 22 decides to forgo continued research to avoid possible infringement.
- 23 • False marking can cause unnecessary investment in design around or costs
 24 incurred to analyze the validity or enforceability of a patent whose number
 25 has been marked upon a product with which a competitor would like to
 26 compete.

1 • Additionally, consumers who see a product as “patented” are likely to infer
2 the product possesses design or utilitarian features that are unique to such
3 article, and not available in substitute articles from other producers, thus
4 inducing consumer demand for the marked article and causing consumers to
5 pay an artificial premium for the product.

6

7 **C. Defendants' False Marking in Violation of the Patent Act**

8

9 18. Defendants Vital Basics, Inc. and Factor Nutrition Labs, LLC
10 manufacture, advertise, license, and distribute the FOCUSfactor® brand of memory-
11 booster dietary supplements. Defendant Walgreen Co. independently advertises the
12 product in media over which it has exclusive control and also distributes the product.
13 Additionally, Defendants utilize a great number of affiliate marketers to drive internet
14 traffic to the FOCUSfactor® homepage. Defendants' affiliate marketers claim that
15 FOCUSfactor® is superior to competing brands of memory supplements because it is
16 patented.

17 19. Based upon the false assertion that the product is patented, Defendants
18 claim that FOCUSfactor® is “America’s best selling memory supplement.” Defendants
19 Vital Basics, Inc. and Factor Nutrition Labs, LLC, in fact, sold over 4,000,000 bottles
20 of FOCUSfactor® and generated sales in excess of \$100,000,000. Defendant Walgreen
21 Co. is believed to have sold over 100,000 bottles of the product.

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23 ///

24 ///

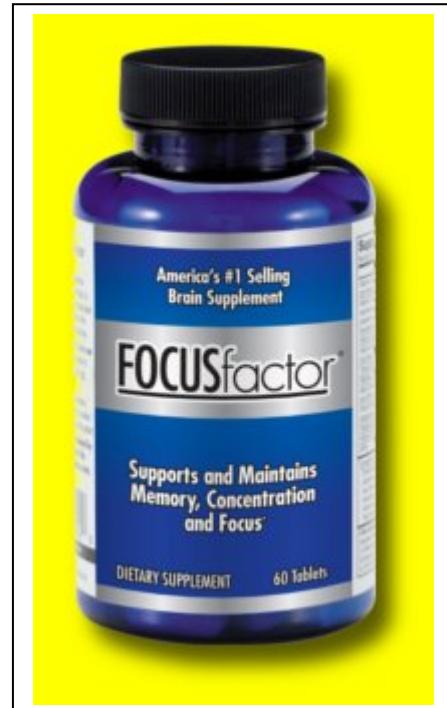
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1 20. The following picture of the FOCUSfactor® packaging has been widely
2 disseminated by the Defendants:



16 21. Defendants' affiliate marketers falsely advertise that FOCUSfactor® is
17 patented. Specifically, Plaintiff's investigations have yielded over 32 separate and
18 independent incidences in which a patented claim is made by Defendants' affiliate
19 marketers. While the affiliate marketers' websites are quite unique, the false patent
20 claims from each website repeat with stunning similarity. Examples of different
21 affiliate marketers' patent claims are as follows:

22 *Focus factor is made of **patented** ingredients. It is a **patented** healthy blend of
23 neuroboosters and nutrients which makes your concentration, memory and focus
24 incredibly great. It is highly recommended and advisable to keep your diet
25 balanced.*

26 (See <http://patrickspithill.com/focus-factor-risk-free-14-day-trial/>, an accurate copy of
27 which is attached hereto as Exhibit 1.)

1 *There is a solution that may help turbo-charge memory through a **patented** blend*
2 *of nutrients. That solution is known as Focus Factor. This is a tablet, similar to a*
3 *vitamin, that's taken once a day to improve memory and focus.*

4 (See <http://www.fresharticleshub.com/?s=focusfactor>, an accurate copy of which is
5 attached hereto as Exhibit 2.)

6 *There's a solution that may help boost memory thru a **patented** blend of*
7 *nutrients. That solution is named Focus Factor. This is a pill, similar to a*
8 *vitamin, that is taken once a day to enhance memory and focus.*

9 (See <http://www.weightlossdietinformation.com/index.php?s=focusfactor>, an accurate
10 copy of which is attached hereto as Exhibit 3.)

11 *There is a solution that may help raise memory through a **patent-protected** blend*
12 *of nutriments. That solution is named Focus Factor. This is a pill, like a vitamin,*
13 *that is taken once a day to boost memory and focus.*

14 (See <http://smarthealthforlife.com/weight-loss/in-order-to-improve-your-memory-use-focus-factor-vitamins>, an accurate copy of which is attached hereto as Exhibit 4.)

15 *There is a solution that may help boost memory thru a **patented** blend of*
16 *nutriments. That solution is known as Focus Factor. This is a pill, like a vitamin,*
17 *thatis [sic] taken once per day to improve memory and focus.*

18 (See <http://www.newhealthnfitness.com/2010/01/try-focus-factor-vitamins-in-order-to-improve-your-memory/>, an accurate copy of which is attached hereto as Exhibit 5.)

19 *There's a solution that will help raise memory thru a **patented** blend of*
20 *nutriments. That solution is named Focus Factor. This is a pill, like a vitamin,*
21 *that's taken once per day to enhance memory and focus... There are six different*
22 *types of vitamin C found in Focus Factor and there also are **patented** neuro*
23 *boosters that really give the brain the boost it needs to focus, concentrate and*
24 *improve memory.*

1 (See <http://www.howtoloseweightinaweek.co.uk/?p=275>, an accurate copy of which is
 2 attached hereto as Exhibit 6.)

3 22. In reality, FOCUSfactor® is **not** patented. Counsel for Plaintiff has
 4 exhaustedly researched public records, including the records of the United States Patent
 5 & Trademark office (found at www.uspto.gov) that are presumed to be conclusively
 6 accurate, and have confirmed that FOCUSfactor® is not patented.

7 23. Given the uniformity of some of the specific claims (two examples: [1]
 8 “There are six different types of vitamin C found in Focus Factor and there are also
 9 patented neuro-boosters”, and [2] “There’s a solution that may help boost memory thru
 10 a patented blend of nutrients”), it stands to reason that at some point the manufacturer
 11 provided approved advertising text to its affiliate marketers. Plaintiff independently
 12 confirmed with three affiliate marketers that the offending text was supplied by the
 13 manufacturer.

14 24. In an effort to curb this extremely deceptive practice, The Federal Trade
 15 Commission (“F.T.C.”) recently enacted new regulations regarding manufacturers’
 16 liability for the conduct of affiliate marketers. (See
 17 <http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>, an accurate copy
 18 of which is attached hereto as Exhibit 7.) In relevant part, these regulations provide that
 19 a manufacturer is generally liable for any false and misleading claims of its affiliate
 20 marketers to the full extent that liability would extend if the manufacturer made such
 21 claims itself.

22 25. David C. Vladeck, the Director of the Federal Trade Commission Bureau
 23 of Consumer Protection, expounded on the guidelines as follows on February 3rd, 2010:

24 *I want to note our growing concern about online affiliate marketing. Marketing
 25 affiliates are third parties—often website operators or individuals—who drive
 26 traffic to a seller’s website in exchange for the payment of a commission from the
 27 seller. Affiliates can do this through several methods, including by sending mass*

1 *emails, purchasing sponsored search engine results, or by purchasing internet*
2 *display ads. The biggest area of concern for the Commission regarding this type*
3 *of marketing is the fact that in some cases, affiliates are essentially let loose on*
4 *the public without adequate direction or supervision to ensure that their*
5 *advertising is truthful and non-misleading...*

6

7 *In many circumstances, affiliates have no or very few up-front costs. This*
8 *structure gives affiliates an incentive to simply drive as much traffic as possible*
9 *to the seller's website, by using any means that will achieve that goal... We*
10 *strongly encourage any company who chooses to use affiliates to market its*
11 *products or services—either directly or through affiliate networks—to take some*
12 *basic steps to ensure that the advertising messages being disseminated on your*
13 *behalf are truthful...*

14

15 *As with traditional forms of marketing, when you pay third parties to act on your*
16 *behalf, you cannot absolve yourself of responsibility for whatever actions those*
17 *third parties might take to sell your product. We urge anyone using affiliate*
18 *marketing, and affiliates themselves, to be cognizant of the fact that FTC liability*
19 *for deceptive advertising can potentially reach anyone in the chain between a*
20 *seller and the ultimate consumer.*

21 (See <http://www.ftc.gov/speeches/vladeck/100203eraspeech.pdf>, an accurate copy of
22 which is attached hereto as Exhibit 8.)

23

24 26. To differentiate itself from other sellers of FOCUSfactor®, Walgreen Co.
25 also prominently advertises a “100% Satisfaction Guarantee” on all of its products.
26 Given that one of the reasons plaintiff purchased the product was because he believed it
27 to be proprietary, he was obviously not satisfied with his purchase and suffered a
28 competitive injury thereby.

1 **D. Defendants' Violation of the Patent Act Was Intentional.**

2 27. This case is “exceptional” for purposes of 35 U.S.C. § 285 because
 3 Defendants Vital Basics, Inc. and Factor Nutrition Labs, LLC had no reasonable basis
 4 upon which to genuinely believe that FOCUSfactor® was patented. Moreover, the
 5 Defendants supplied the affiliate marketers with the offending text. The case may also
 6 be exceptional as to Defendant Walgreen Co. if Defendant continued to sell the mis-
 7 marked product after learning or constructively learning that FOCUSfactor® was not
 8 patented.

9 28. In fact, this is not the first time that Defendants Vital Basics, Inc. and
 10 Factor Nutrition Labs, LLC have run afoul of the law by making false claims about
 11 FOCUSfactor®. In fact, on March 17, 2004, in a press release entitled “***Marketers of***
 12 ***the Supplements “Focus Factor” and “V-Factor” Agree to Settle FTC Charges and***
 13 ***Pay \$1 Million***” the Federal Trade Commission Noted:

14
 15 *Marketers of “Focus Factor,” a dietary supplement that purports to*
 16 *improve concentration. . . have agreed to settle Federal Trade Commission*
 17 *charges that they made numerous unsubstantiated advertising claims for*
 18 *the products. In one complaint, the FTC charges Vital Basics, Inc. of*
 19 *Portland, Maine, and its principals, Robert Graham and Michael Shane*
 20 *(VBI respondents), with not having adequate substantiation to back up*
 21 *claims they made about the efficacy of “Focus Factor” and the safety of*
 22 *“V-Factor Natural Pack.” The VBI respondents have agreed to a consent*
 23 *order containing provisions designed to prevent them from engaging in*
 24 *similar acts or practices in the future and requiring the payment of \$1*
 25 *million in consumer redress.*

1 29. The injunction entered by the Federal Trade Commission prohibits
 2 Defendants from making any representation about the safety, performance, benefits or
 3 efficacy for any food, drug or dietary supplement for “the brain or any mental functions
 4 or processes.” (See the FTC report at <http://www.ftc.gov/opa/-2004/03/vitalbasics.shtm>
 5 and a true and correct copy of the web scrape attached hereto as Exhibit 9.)

6 30. This false marking scheme has deceived the public and stifled legitimate
 7 competition, allowing Defendants to gain a competitive advantage in the market, where
 8 there are now several competing products available for a lower price.

9 **V. FIRST CAUSE OF ACTION: FALSE PATENT MARKING**

10 31. Plaintiff re-alleges the preceding paragraphs and incorporates them herein
 11 by reference.

12 32. Defendants know that they can charge a premium for dietary supplements
 13 that the public perceives to be unique and protected by a patent.

14 33. Defendants have continuously advertised and driven internet traffic to the
 15 FOCUSfactor® website through use of affiliate marketers and have sold
 16 FOCUSfactor® as patented when it is not.

17 34. Defendants have violated 35 U.S.C. § 292(a), which provides in relevant
 18 part:

19 *Whoever without the consent of the patentee, marks upon, or affixes to, or uses in
 20 advertising in connection with anything made, used, offered for sale, or sold by
 21 such person within the United States, or imported by the person into the United
 22 States, the name or any imitation of the name of the patentee, the patent number,
 23 or the words "patent," "patentee," or the like, with the intent of counterfeiting or
 24 imitating the mark of the patentee, or of deceiving the public and inducing them
 25 to believe that the thing was made, offered for sale, sold, or imported into the
 26 United States by or with the consent of the patentee; or Whoever marks upon, or
 27 affixes to, or uses in advertising in connection with any unpatented article the*

word "patent" or any word or number importing the same is patented, for the purpose of deceiving the public; or Whoever marks upon, or affixes to, or uses in advertising in connection with any article the words "patent applied for," "patent pending," or any word importing that an application for patent has been made, when no application for patent has been made, or if made, is not pending, for the purpose of deceiving the public - Shall be fined not more than \$500 for every such offense.

35. Each false marking on or advertising of a bottle of FOCUSfactor® has misled consumers about their options regarding dietary memory supplements and has stifled research into and development of competing products. As such, Defendants' actions have harmed the public, its competitors, and the United States.

36. Defendants have wrongfully and illegally advertised a patent monopoly that they do not possess and, as a result, have benefitted commercially and financially by maintaining false statements of patent rights and by selling products that are falsely marked as such.

37. Defendants are therefore liable to plaintiff and to the United States under 35 U.S.C. §292 (b). The public interest requires that Defendants be enjoined from further acts of false marking, pay civil penalties, and make restitution for their ill-gotten gains.

VI. PRAYER FOR RELIEF

Plaintiff seeks entry of judgment against Defendants as follows:

1. A judicial determination that Defendants have violated 35 U.S.C. §292 by falsely advertising and marking FOCUSfactor® as “patented” for the purpose of deceiving the public;

2. An order fining Defendants for false marking in an amount that is reasonable in light of the total revenue and gross profit derived from the sale of falsely

marked bottles of FOCUSfactor® and the degree of intent to falsely mark which is proven, with half of the fine paid to the United States Government and the other half to plaintiff;

3. An order preliminarily and permanently enjoining Defendants and their affiliates from committing new acts of false patent marking and to cease all existing acts of false patent marking;

4. An award of attorneys' fees and costs incurred in bringing and maintaining this action as to Defendants Vital Basics, Inc. and Factor Nutrition Labs, LLC, in part because the case is "exceptional" for purposes of the Patent Act; and

5. Any such other relief to which plaintiff, the United States, or the general public may be entitled.

Dated: July 9, 2010

NEWPORT TRIAL GROUP
A Professional Corporation

By: /s/ Scott J. Ferrell
Scott J. Ferrell

Attorneys for Plaintiff

1 **DEMAND FOR JURY TRIAL**
2

3 Pursuant to Federal Rule of Civil Procedure Section 38(b), Plaintiff demands a
4 trial by jury on all issues so triable.

5 Dated: July 9, 2010

6 NEWPORT TRIAL GROUP
7 A Professional Corporation

8 By: /s/ Scott J. Ferrell
9 Scott J. Ferrell

10 Attorneys for Plaintiff